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No. 73-6370

In the
Supreme Court of the United States
October Term, 1973

BEN F. PFEIFER, et al,
Petitioner,

vs.

BELL & HOWELL COMPANY, et al,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATUTE AND RULE INVOLVED

28 United States Code §1254:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * "

Rules of the Supreme Court of the United States: "Rule 20. Certiorari to a Court of Appeals Before Judgment.

A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

Nature of This Case

On February 1, 1973, Ben F. Pfeifer, et al, ("Pfeifer") filed suit — pro se and in forma pauperis in the Circuit Court of Cook County, Illinois, alleging, among other things, violations by defendant Bell & Howell Company ("Bell & Howell") of "numerous sections of U. S. Code Titles, 15, 18 and 41, together with violations of U. S. Constitutional Amdt's. 1, 5, 13 and 14." (The original complaint does not appear to be included in the petition for writ of certiorari).

On March 6, 1973 (within thirty days of service of the complaint on it), Bell & Howell petitioned for removal of the action to the United States District Court for the Northern District of Illinois, Eastern Division, on the basis of the federal questions involved. 28 U.S.C. §1441 (b). (p. 343, Petition). The case was removed to the District Court under docket number 73 C 580.

On March 23, 1973, pursuant to the teachings of *General Investment Co.* v. *Lake Shore and Michigan Railway Co.*, 260 U.S. 261 (1922), Bell & Howell moved to strike all portions of the complaint making reference to or relying on the federal antitrust laws and dismissing such claims without prejudice. (p. 350, Petition). This motion was subsequently granted on August 27, 1973 (p. 375, Petition).

In the interim, Pfeifer:

(1) Filed an appeal to the 7th Circuit Court of Appeals, apparently from the removal of the case to the District Court and the District Court Judge's order requiring him to file an amended complaint and to respond to the motion to dismiss within twenty days. (p. 353, Petition). This appeal was dismissed, on Bell & Howell's motion, by the Court of Appeals on June 11, 1973 on the grounds that the order appealed from was not a final and appealable order (p. 367, Petition).

(2) Attempted to file an amended complaint in the Circuit Court of Cook County, Illinois, where the original complaint had been filed (p. 361, Petition). The Circuit Court of Cook County denied that motion on May 30, 1973, "for lack of jurisdiction because of removal to the federal district court." (p. 365, Petition).

(3) Attempted to appeal the Circuit Court of Cook County's May 30, 1973 order to the Illinois Supreme Court (which forwarded it to the Illinois Appellate Court because it lacked jurisdiction over the appeal (p. 370, Petition). The Illinois Appellate Court dismissed the appeal on Bell & Howell's motion for "lack of an appealable order." (p. 393, Petition).

On September 14, 1973, Bell & Howell filed a motion in the District Court to strike the complaint and dismiss the action for violations of Rules 8(a) and 8(e), F.R.C.P., statute of limitations, failure to state a cause of action, and lack of standing. (p. 378, Petition).

On September 14, 1973, Pfeifer moved to remand the case to the Circuit Court of Cook County (p. 381, Petition). The motion to remand was denied by the District Court. (p. 391, Petition).

On October 29, 1973, the District Court struck Pfeifer's complaint and dismissed the action without prejudice and without costs. (p. 394, Petition), grounding its opinion on Rule 8(a).

On September 24, 1973, Pfeifer filed a notice of appeal of the District Judge's October 29, 1973 order [sic!] with the 7th Circuit Court of Appeals (page following 399, Petition). (The notice of appeal does not appear to be included in the petition for writ of certiorari).

On November 19, 1973, the Court of Appeals denied Pfeifer's motion for leave to proceed in forma pauperis (p. 398, Petition).

On November 26, 1973, Pfeifer moved the District Court to vacate its October 29, 1973 order of dismissal. That motion was denied. (p. 399, Petition).

On November 30, 1973, Pfeifer moved the Circuit Court of Cook County to vacate its order of May 30, 1973 (p. 400, Petition). That motion was denied on the basis of lack of jurisdiction. (pp. 404-405, Petition).

On February 15, 1974, portions of the original petition for writ of certiorari were filed with the Clerk of the Supreme Court, and the petition was ultimately docketed on March 7, 1974.

There have been no further proceedings in the Court of Appeals subsequent to its denial of Pfeifer's motion for leave to proceed in forma pauperis.

Argument

What orders Pfeifer is actually now seeking to review, as well as the basis for such review, are not clear.

If review is sought from the Court of Appeals' order denying leave to proceed in forma pauperis, it is clear that permission to appeal in forma pauperis is properly denied where, as here, the applicant's claims are patently frivolous. See 28 U.S.C. §1915. As the record and the Petition itself reveal, the Court of Appeals did not abuse its discretion in this instance. *Kinney* v. *Plymouth Rock Squab Company,* 236 U.S. 43 (1915).

If review is sought from the District Court's order on the merits, all of these questions should first be litigated in the Court of Appeals where Pfeifer has not bothered to pursue his appeal. While under 28 U.S.C. §1254, this Court could grant a writ of certiorari at this time, none of the factors which would motivate it to exercise such extraordinary discretion are present. See Supreme Court Rule 20; *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R. Co.*, 389 U.S. 327 (1967).

Finally, the dismissal was without prejudice, and thus did not constitute an adjudication of Pfeifer's rights, if any, concerning the matters alleged in the complaint.

Conclusion

It is therefore respectfully submitted the petition for writ of certiorari should be denied.

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